Supreme Court, U.S.
FILED

No. 99 1052 DEC 17 1999

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

WILLIAM P. VERKIN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the Court of Appeals' affirmance of Verkin's convictions for conspiracy and bank fraud, on the basis of accusations that were never made in the indictment, and that substantially broadened the indictment, violated Verkin's Fifth Amendment right to grand jury indictment?

2. Whether the Government's failure to have given Verkin notice of the accusations on which his convictions eventually were based until the morning his trial began deprived him of his Fifth Amendment rights to grand jury indictment and to due process of law, and his Sixth Amendment right to a fair trial?

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Opinions Below

The Fifth Circuit's opinions are unreported (App. A-1, C-1).

Jurisdiction

The Court of Appeals' opinion and judgment are dated August 20, 1999 (App. A-1). The Court denied Verkin's timely petition for panel rehearing and suggestion for en banc rehearing on September 21, 1999 (App. B-1). This petition for certiorari was filed within 90 days thereafter and is timely.

The District Court had jurisdiction under 18 U.S.C. § 3231. The Fifth Circuit had jurisdiction under 28 U.S.C. § 1291. The Supreme Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

This case involves the Fifth and Sixth Amendments, and the federal conspiracy and bank fraud statutes (App. D-1).

Statement of the Case

The Indictment

In 1994 a Houston federal grand jury returned a two-count indictment (App. E-1), charging Verkin and three other defendants with conspiracy and bank fraud, allegedly arising from loans they obtained in 1987 from the Government Employees Credit Union of San Antonio.

The first count of the indictment alleged a conspiracy by the defendants to commit the substantive bank fraud offense set out in the second count. Count 2 alleged that the defendants, aiding and abetting one another, knowingly devised and intended to devise a "scheme and artifice to defraud" a federally insured credit union.[1]

Describing the purported "scheme and artifice," the indictment alleged that the four defendants, needing a land acquisition loan of about $1.5 million, created a sham joint venture to deceive the credit union into believing they needed about $2.2 million to buy the land, and that they used a straw man to conceal from the credit union that the defendants were receiving about $666,000 of excess loan proceeds for their personal use.

The indictment did not allege, even by implication, that Verkin or the other defendants

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[1] Alternatively, Count 2 alleged that the defendants knowingly devised and intended to devise a scheme and artifice "to obtain monies, funds, assets and other property owned by and under the control of the credit union, by means of false and fraudulent pretenses, representations and promises."

Because the Government abandoned this portion of the indictment after the close of the evidence (Supp. R. 12: 101-02), the trial court's instructions permitted a conviction on Count 2 only upon proof of the "scheme and artifice to defraud" outlined in the indictment (Docket Entry 349, May 13, 1998).

defrauded or conspired to defraud the credit union by providing false, fraudulent, or misleading appraisals of the land, to induce the credit union to make a loan, secured by overvalued collateral, that it might not otherwise have made. The indictment did not mention the appraised value of the land (approximately $32.4 million), or any allegedly false or fraudulent representations relating to appraisals. The grand jury did not charge that inflated appraisals were any part of the conspiracy alleged in Count 1, or of the scheme and artifice to defraud alleged in Count 2, and did not allege that purported fraud in the appraisals or their valuation of the land induced or influenced the credit union to make the loan.

The First Trial

Verkin and two codefendants were first tried in Houston in 1995, after the fourth defendant struck a deal and testified for the prosecution. While the Government's lawyers maintained that the $32.4 million appraisal of the land was "a pie in the sky" and "unrealistic" (R. 5: 7), they never asserted or attempted to prove that Verkin was criminally responsible for fraudulently inflating the appraisal. In fact, Government counsel asserted that "if the existence of the appraisal is not going to come into evidence, that would be fine with us" (R. 5: 6).

The Government offered no evidence that Verkin or the other defendants knowingly made

false statements to the appraisers of the land, in order to fraudulently inflate its appraised value, to induce the credit union to make the loan. In closing argument, Verkin's lawyer pointed out that the Government made "[n]o attempt whatever to attack the validity of those appraisals," and that "[t]he value of the land and validity of the appraisal is absolutely totally undisputed" (R. 12: 1451). The Fifth Circuit subsequently agreed with this assessment in the first appeal of this case.[2]

After the Government rested, the trial court denied the defendants' timely written motion for acquittal (R. 4: Tab 118, August 14, 1995; Tab 120, August 15, 1995; R. 12: 1539-49; Docket Entry 122, August 15, 1995). Verkin and his codefendants then rested, without testifying or presenting evidence. The jury convicted all three of them on both counts (R. 3: Tab 225, December 11, 1995), and they appealed.

The First Appeal

In an unreported 1997 opinion (App. C-1), the Fifth Circuit reversed the convictions of all defendants, and remanded for a new trial. The panel determined that the trial judge had mistakenly allowed the Government to introduce inadmissible,

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2 "The appraised value of the . . . property was accurately revealed and well in excess of the amount the credit union determined was necessary to secure that portion of the loan" (App. C-14).

prejudicial hearsay (a narrative proffer of evidence that accompanied a codefendant's guilty plea, and deposition testimony and answers to interrogatories from a related bankruptcy proceeding), and that the errors were not harmless.

In assessing the claimed insufficiency of the evidence, the panel held that "the documents available at the real estate closing revealed all the relevant information, including who held title to the land, how the loan proceeds were being distributed, and [the straw man's] true role in the transaction" (App. C-13). The panel nevertheless sustained the sufficiency of the evidence against all three defendants, after acknowledging that the "evidence in this case raised real sufficiency concerns" (App. C-9), and that "[t]hese facts present a very close question" (App. C-15):

> The record does reveal that defendants made one misrepresentation during the negotiations, which the government emphasized at trial. The original proposal included about 500 acres of real estate, appraised at $32 million. Later, 41 acres were carved out of that parcel and transferred to the defendants free and clear. There is evidence that the defendants lied to the credit union about the reasons for this change — claiming that the 41 acre change resulted from "survey problems" which did not exist. A rational juror could certainly

> conclude that this was a misrepresentation, but it was simply not material to the credit union's decision to loan the money. *The appraised value of the remaining property was accurately revealed* and well in excess of the amount the credit union determined was necessary to secure that portion of the loan (App. C-14; emphasis added).

The Second Trial

Following remand, Verkin's codefendants reached plea agreements with the Government, leaving only Verkin's case to be retried.

On the morning the second trial began, the Government filed a trial brief, announcing for the first time its intention to rely upon an additional, distinct basis for conviction that was never alleged in the indictment, and not proved or pursued at all in the first trial — that Verkin had knowingly devised and participated in a scheme and artifice to defraud the credit union by fraudulently securing and submitting inflated real estate appraisals that substantially overvalued the land, and that such alleged overvaluing of the real estate was a material inducement to the credit union's funding of the loan.

Verkin's counsel promptly moved, orally and in writing, to exclude such evidence and argument, contending that allowing it would unfairly broaden and constructively amend the allegations in the

indictment, in violation of Verkin's Fifth and Sixth Amendment rights (Supp. R. 138-42; R. 2: Tab 317, April 27, 1998). The trial court overruled the motion (Supp. R. 2: 141-42), and refused Verkin's request for a cautionary instruction for the jury to disregard such matters (R. 2: Tab 318, April 28, 1998). Verkin's subsequent motion for a brief continuance of the trial, to allow him to attempt to gather evidence to rebut those accusations, also was denied (R. 2: Tabs 325, 327, May 4, 1998).

The Government then offered the testimony of two real estate appraisers and several other witnesses, none of whom testified at the first trial, and a myriad of additional documents, never offered at the first trial, in an effort to show that Verkin had deliberately misled the appraisers about the value of the land; that his alleged actions were knowingly undertaken, in furtherance of the alleged conspiracy, in order to defraud the credit union; and that the alleged misrepresentations were material to the credit union's decision to make the loans.[3]

At the second trial, there was no direct or

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[3] In overruling Verkin's objections, the trial court mistakenly thought that the issue of whether the appraisals were fraudulent or inflated had been contested in the first trial (Docket Entries 317 and 319, April 27 and 28, 1998). In fact, the record of the first trial conclusively establishes that the Government never made that claim, and never introduced any evidence to support it.

circumstantial evidence that Verkin knew about, or was criminally responsible for, the alleged misrepresentation concerning "survey problems" relating to the 41 acres. The misrepresentation allegedly was made at the direction of one of Verkin's codefendants (Supp. R. 2: 213-215). Verkin himself never made any false representations to the credit union concerning the 41 acres, and there is no evidence he ever knew of any such misrepresentations by others. Thus, there was no evidentiary basis in the second trial to sustain a conviction on the theory previously advanced by the Court of Appeals.

Instead, the Government's closing argument to the jury explicitly urged the jury to find Verkin guilty because of the supposedly inflated appraisals, even though nothing whatever in the indictment alleged that crime (Supp. R. 12: 192):

> So, Mr. Verkin was certainly instrumental in submitting the false appraisals to the credit union. I mean, if the credit union had known that the land that they were loaning money on was not worth anywhere near [its appraised value], we could have had a completely different situation here.

The jury convicted Verkin on both counts of the indictment. The trial court denied Verkin's renewed, post-verdict motion for acquittal (R. 1: Tab 362) (July 1, 1998), and sentenced him to

concurrent 33-month terms of imprisonment on each count, a $5,000 fine, and a $100 special assessment.

The Second Appeal

The Fifth Circuit affirmed the convictions in a three and one-half page unpublished *per curiam* opinion that cites no cases. The panel's affirmance rested upon two different grounds.

First, the panel believed that the Government had not violated Verkin's Fifth and Sixth Amendment rights, by constructively amending the indictment to unfairly broaden the possible grounds for conviction, because "the evidence of an additional false statement does not change the offense with which Verkin is charged" (App. A-3). The panel reached this conclusion even though the "scheme and artifice to defraud" alleged in the indictment did not encompass fraudulent misrepresentations involving land appraisals, and even though the Government acknowledged at oral argument that it had belatedly modified its theory of the case at the second trial, in a calculated effort to overcome the weakness in its case disclosed by the Fifth Circuit's opinion on the first appeal.

Second, impliedly recognizing that the evidence was insufficient to show that Verkin knowingly participated in a fraudulent scheme to withdraw 41 acres from the transaction, the panel did not address that question, or base its affirmance

on that ground. Instead, the panel concluded "there was sufficient evidence for the jury to reasonably conclude that Verkin participated in a misrepresentation of the appraised value of the land," and therefore affirmed the convictions only on that basis (App. A-4).

Reasons for Granting the Petition

1. The Fifth Circuit's decision undermines the fundamental constitutional principle, long respected by this Court and lower federal courts, that a federal criminal defendant may not be convicted on the basis of accusations not made in the indictment.

William Verkin "was convicted on a charge the grand jury never made against him." *Stirone v. United States*, 361 U.S. 212, 219 (1960). The Fifth Circuit then affirmed the conviction, solely on an accusation the grand jury never made. "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

"[A]fter an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215-16 (1960). "[A] court cannot permit a defendant to be tried on charges that are not made in the indictment against him,"

since "the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for [criminal acts] which the grand jury did not charge." *Id.* at 217-18. "A constructive amendment of the indictment is a reversible error per se if there has been a modification at trial of the elements of the crime charged." *United States v. Salinas*, 601 F.2d 1279, 1290 (5 Cir. 1979), *appeal following remand*, 654 F.2d 319 (5 Cir. 1981), *overruled on other grounds, United States v. Adamson,* 700 F.2d 653 (5 Cir. 1983) (en banc)

Realizing from the Fifth Circuit's opinion on the first appeal just how weak its original case had been, and that it would probably lose the second time around, the Government blindsided Verkin and his counsel at the second trial, by constructively amending the indictment, in violation of Verkin's Fifth and Sixth Amendment rights. The Government expanded the scope of the purported "scheme and artifice to defraud," relying upon an entirely new and different theory of criminality — purported fraud in securing and submitting allegedly inflated real estate appraisals to the credit union — that was never presented to the grand jury, never alleged in the indictment, and never asserted or proven at all in the first trial. That constitutional error compels reversal. The Court of Appeals' inexplicable refusal to correct it warrants review by this Court.

Verkin's convictions could be sustained only if "the proof upon which they are based corresponds to an offense that was clearly set out in the indictment." *United States v. Miller*, 471 U.S. 130, 136 (1985). Here, the basis upon which the Fifth Circuit the sustained the convictions — that Verkin allegedly "participated in a misrepresentation of the appraised value of the land" (App. A-4) — was not alleged in the indictment at all. The word "appraisal," and the term "fraudulent appraisal," do not even appear in the indictment. Verkin was entitled, as a matter of federal constitutional right, to be tried only on the allegations of the indictment returned by the grand jury, not on some materially different allegations that clever Government counsel, and astute FBI agents, concocted after the fact, long after the original indictment was returned.

The Government cannot ameliorate the Fifth Amendment violation by arguing that Verkin's supposed involvement in the fraudulent appraisals furthered the conspiracy, and the "scheme and artifice to defraud," that was actually alleged in the indictment. As Verkin maintained in the Court of Appeals, the record evidence, apart from the appraisals, is otherwise constitutionally insufficient to sustain the indictment's allegations. The appraisals thus cannot have "furthered" the commission of offenses that were never independently established by the evidence.

Moreover, the Court of Appeals was plainly mistaken when it held that "the evidence of an additional false statement [relating to the appraisals] does not change the offense with which Verkin is charged" (App. A-3). Verkin was not convicted for making "false and fraudulent pretenses, representations and promises" to the credit union,[4] but of knowingly devising and intending to devise a "scheme and artifice to defraud" the credit union. The "scheme and artifice" alleged in the indictment does not involve fraudulent appraisals at all.

United States v. Nuñez, 180 F.3d 227 (5 Cir. 1999), decided less than two months before the panel opinion in this case, is illustrative. Nuñez was indicted for allegedly resisting arrest with a firearm. The trial court instructed the jury it could convict, even if it found that Nuñez resisted arrest without using a firearm. The jury acquitted the defendant of resisting arrest with a firearm, but convicted on the broader charge of resisting arrest without using a firearm — a charge not contained in the indictment, and that the grand jury had never made. The Court of Appeals reversed:

> [T]hough the conviction arose from the same factual incident, the difference between the specific details of the indictment and the general jury instruction

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[4] The Government abandoned that portion of the indictment when it rested its case (see footnote 1, *supra*).

is too great to survive the requirements of the Fifth Amendment. Nuñez was convicted of a crime, resisting arrest by *any* means, for which he was not indicted.

* * *

Nuñez rightly argues that the indictment failed to charge the offense for which he was convicted. The jury instruction, without specific reference to how he resisted arrest, impermissibly *broadens* the indictment to include all sorts of resistance. . . Nuñez's single-count indictment alleged a single offense: "resisting arrest by means of a firearm." This is a specific and narrow accusation, and the later jury instruction allowing conviction for "resisting arrest" is far more general and broad.

It is this very type of "broadening" that [*Miller v. United States*, 471 U.S. 130 (1985)] refused to endorse. In contrasting its holding to that in *Stirone*, the *Miller* court emphasized that in *Stirone*, the "trial evidence had 'amended' the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment." 180 F.3d at 232-33 (emphasis in original).

In precisely the same sense, both the Government and the Court of Appeals *broadened* the "scheme and artifice to defraud" alleged in Verkin's indictment, by adding allegations of fraudulent misrepresentations about real estate appraisals that the grand jury never made, and that never surfaced at all in the first trial. Verkin was sandbagged by new, belated allegations, contrived by prosecutors determined to win a jury verdict.

United States v. Doucet, 994 F.2d 169 (5 Cir. 1993) is also directly in point. In *Doucet,* the defendant had been indicted by a federal grand jury for possession of an unregistered firearm, modified to fire as a machine gun. During trial, after the defendant had made a compelling case for entrapment, the Government changed its position, to rely upon a theory of criminality much broader than that alleged in the indictment: that is, that the jury could convict the defendant "for mere possession of the unregistered *component parts* of a machine gun, rather than for the offense for which he was indicted: possession of an unregistered *assembled* machine gun." 994 F.2d at 171 (emphasis in original).

The Fifth Circuit rejected this tactic, and reversed Doucet's conviction:

> The Fifth Amendment provides for criminal prosecution only on the basis of grand jury indictment. Only the grand jury can amend an indictment to broaden it.

Stirone v. United States, 361 U.S. 212, 215-16, 80 S.Ct. 270, 272, 4 L.Ed.2d 252 (1960). The amendment need not be explicit to constitute reversible error, but may be implicit or constructive. This occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. *United States v. Baytank,* 934 F.2d 599, 606 (5th Cir. 1991). Constructive amendment requires reversal of the conviction. *Id.* Moreover, it is clear that the indictment may be amended constructively by the actions of either the court or the prosecutor. [*United States v. Salinas*, 654 F.2d 319 at 324 (5th Cir. 1981).

* * *

More importantly, [*United States v. Beard*, 436 F.2d 1084 (5th Cir. 1971)] recognizes that the government's change in position during the trial can be sufficient to work a constructive amendment of the indictment even where the court does not formally alter the elements of the offense in the jury charged. The only question, then, is whether the government changed its theory during the trial so as to urge the jury to convict on a basis broader than that charged in the indictment.

As in *Stirone*, *Nuñez*, and *Doucet*, the Government convicted Verkin, and the panel mistakenly affirmed the convictions, "on a basis broader than that charged in the indictment" — indeed, for alleged crimes that were not even alleged in the indictment. The "scheme and artifice to defraud" alleged in the indictment has nothing whatever to do with real estate appraisals. Enlargement and expansion of the scope of the alleged scheme by a Government prosecutor, without the intercession of a grand jury, violates the Fifth and Sixth Amendments, and the mandate of *Stirone*, *Miller*, *Nuñez*, and *Doucet*, and is reversible error.[6]

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[6] *See also United States v. Mize*, 756 F.2d 353, 355 (5 Cir. 1985), *cert. denied*, 484 U.S. 943 (1987) (Fifth Amendment does not permit the jury "to convict the defendant on a factual basis that effectively modified an essential element of the offenses charged"); *United States v. Salinas*, 654 F.2d 319, 324-25 (5 Cir. 1981), *overruled on other grounds, United States v. Adamson*, 700 F.2d 953 (5 Cir. 1983) (en banc) (indictment alleged conspiracy with bank president, evidence showed conspiracy with vice president); *United States v. Floresca*, 38 F.3d 706 (4 Cir. 1994) (defendant indicted under one section of criminal statute; jury instructed that it might convict under another, entirely different section); *United States v. Willoughby*, 27 F.3d 263 (7 Cir. 1994) (defendant convicted of crime not alleged in indictment); *United States v. Lawton*, 995 F.2d 290 (D. C. Cir. 1993) (improper expansion of indictment beyond its terms); *Moore v. United States*, 512 F.2d 1255

2. The Government's failure to have given Verkin notice of the accusations on which his convictions eventually were based until the morning his trial began deprived him of his Fifth Amendment rights to indictment and to due process of law, and his Sixth Amendment right to a fair trial.

One of the most important functions an indictment serves is to provide fair notice of the charges against which the accused must defend, and to allow a reasonable opportunity to prepare a defense against those charges. *United States v. Miller*, 471 U.S. 130, 135 (1985); *Russell v. United States*, 369 U.S. 749, 763-64 (1962). No trial can reasonably be characterized as fair if the defendant is first apprised of the charges on the day the trial begins.

The Government did not provide written notice to Verkin and his counsel that it would seek to rely for conviction on allegedly fraudulent real estate appraisals until the morning the second trial began — almost three years after the indictment was returned. The trial court overruled Verkin's objections to defending against those accusations because they were not contained in the indictment, and because he had received no prior notice of them (Supp. R. 2: 138-142).

(4 Cir. 1975) (constructive amendment to charge different firearm than that alleged in indictment).

The Court of Appeals affirmed Verkin's convictions solely on the grounds that "there was sufficient evidence for the jury to reasonably conclude that Verkin participated in a misrepresentation of the appraised value of the land" (App. A-4). Thus, Verkin was convicted on the basis of accusations that were never presented to him in writing until a few minutes before his trial started.

"An indictment is not putty in the government's hands." *United States v. Doucet*, 994 F.2d 169, 173 (5 Cir. 1993). Verkin simply did not commit the crimes alleged in the indictment. The Government did not prove he committed those crimes. He cannot now be convicted of entirely different crimes, never alleged by a grand jury, without doing unwarranted violence to fundamental constitutional principles that should extend routinely, as a matter of course, to every defendant in every federal criminal trial.

Uncorrected constitutional error of this magnitude in a federal criminal trial is deplorable, unconscionable, and unacceptable. The Court of Appeals' decision "departed from the accepted and usual course of judicial proceedings, [and] sanctioned such a departure by a lower court, [calling] for an exercise of this Court's supervisory power." Supreme Court Rule 10(c). Certiorari should be granted to review and correct the error.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

(August 20, 1999)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-21072

UNITED STATES OF AMERICA,

Plaintiff-Appelle,

VERSUS

WILLIAM P. VERKIN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas
(CR-H-94-141)

Before POLITZ, JOLLY, and DUHE, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstance set forth in 5TH CIR. R. 47.5.4.

This case involves a fairly complex real estate deal involving Verkin and several business partners of Verkin's. In 1986, Verkin had earnest money contracts on about 500 acres of undeveloped land owned by the heirs of John A. Campbell ("the Campbell heirs"). Around the same time, Verkin discovered a business opportunity involving Burkett's Distributing Company, a beer distributorship that was potentially profitable but had defaulted on loans it owed to the Government Employees Credit Union ("GECU"). Verkin and three partners decided to structure a deal whereby they would acquire both the 500 acres of land and the brewery by using the land as collateral. They were successful in obtaining loans from GECU and completed the deal. During the negotiations, one of Verkin's partners told the bank that, due to surveying errors, the mortgage should only cover 458 acres (this statement was false). Shortly thereafter, their plans fell apart and they defaulted on the loans. In the aftermath, Verkin and his three partners were charged with and convicted of conspiracy and bank fraud. Verkin now appeals and, finding no error on the part of the district court, we affirm.

After the indictments were issued, one of Verkin's partners pled guilty and Verkin and the other two went to trial. In that trial, the government focused on two overt misstatements made by the partners: (1) that the partners claimed that some of the money from the GECU loan was used to buy out an old partner when the money was actually apportioned among the four partners and (2) that the partners lied when they claimed that

the 500-acre parcel should be reduced because of surveying errors. All three were convicted by a jury and all three appealed.

In an unpublished opinion, a panel of this court held that the district court erred in permitting certain testimony and remanded for a new trial. On remand, Verkin's two remaining co-defendants both pled guilty and the case proceeded to trial. During the new trial, the government modified its theory with respect to the case. The government introduced new evidence that the appraised value of the 458 acres was inflated by Verkin, leading GECU to grant a higher line of credit than it otherwise would. Verkin was again convicted of conspiracy and bank fraud and he again appealed.

Verkin's principal argument on appeal is that, during the second trial, he was tried for a different charge from the one described in the indictment. This argument fails as the evidence of an additional false statement does not change the offense with which Verkin is charged.

Verkin also argues that the evidence is insufficient to support the verdict. In our first unpublished opinion, we admitted that this case is a relatively close one, but ultimately concluded that the evidence could be sufficient. In our first opinion, we did note that, standing alone, the supposed misrepresentation about needing additional funds to buy out a partner was not particularly persuasive. Verkin's argument is that if that misrepresentation is insufficient, then there is no evidence that Verkin was aware or participated in the misrepresentation about the survey. Even if

that were the case, however, there was sufficient evidence for the jury to reasonably conclude that Verkin participated in a misrepresentation of the appraised value of the land. Although, as we have said previously, this is a close case, it is ultimately one for the jury to decide.

Verkin raises four other issues on appeal, but none of them present a reversible error on the part of the district court. For the foregoing reasons, we therefore AFFIRM the ruling of the district court.

AFFIRMED.[1]

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[1] The appellant's renewed motion for release from custody pending appeal is DENIED as moot.

Appendix B

(September 21, 1999)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-20779

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

WILLIAM P VERKIN

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Opinion 8/20/99. 5 Cir., _____ F3d ____)

Before POLITZ, JOLLY, and DUHE, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for

Panel rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

E. GRADY JOLLY
United States Circuit Judge

Appendix C

(May 15, 1997)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-21072

UNITED STATES OF AMERICA,

Plaintiff-Appelle,

VERSUS

JERALD J. HENDRICKS; WILLIAM P. VERKIN, MICHAEL J. FRYE,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas
(CR-H-94-141)

Before GARWOOD, DeMOSS and PARKER, Circuit Judges.

PER CURIAM:*

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

William P. Verkin ("Verkin"), Jerald J. Hendricks ("Hendricks") and Michael J. Frye ("Frye") appeal their convictions for conspiracy to commit bank fraud in violation of 18 U.S.C § 371 and bank fraud in violation of 18 U.S.C. § 1344. For the following reasons, we reverse.

PROCEEDINGS AND DISPOSITION BELOW

Verkin, Hendricks, Frye and Joseph Russo ("Russo") were charged in a two count indictment with bank fraud and conspiracy to commit bank fraud. Russo pleaded guilty and testified against the others. During trial, the district court granted a motion for judgment of acquittal as to the first paragraph of Count One which charged the defendants with conspiring to defraud the United States, but denied a motion for acquittal on the remaining paragraph which charged conspiracy to defraud a credit union. The jury found Verkin, Hendricks, and Frye guilty of both conspiracy and bank fraud.

Verkin was sentenced to two consecutive two-year terms of confinement. Frye and Hendricks were each sentenced to two consecutive three-year terms of confinement.

FACTS[1]

This case involves to interrelated transactions; the defendants' purchase of 500 acres on 1-45 in League City, Texas and of a Coors Beer distributorship in San Antonio, Texas from Burkett's Distributing Company.

In November 1986, Verkin, a licensed real estate agent, executed earnest money contracts for the League City acreage as trustee for an undisclosed principal. The purchase price was $8.9 million, with a down payment of $1.5 million, and the remainder to be financed by the owners, a group of related entities referred to as the Campbell Estate. The land was valued at $32 million by contemporaneous appraisals. Verkin later negotiated for 41 of the 500 acres of the land to be transferred free and clear.

In the summer of 1986, Pat Gooden, a business broker, alerted Frye and Hendricks to the availability of the beer distributorship. The distributorship was in default on $6 million in loans from the Government Employee's Credit Union ("GECU") and had other indebtedness of $4 million. Frye and Hendricks decided to buy the distributorship and proposed refinancing the distributorship debt through GECU and reallocating a portion of that debt to the League City acreage.

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[1] The record contains conflicting evidence about the exact amount of some relevant figures. These discrepancies do not impact the issues before this court. We therefore make no attempt to resolve the discrepancies and use approximate figures in the recitation of facts.

On February 5, 1987, GECU approved a $9,649,000 loan for "down payment and contingency residual principal and interest in connection with a work out loan for acquisition of Burkett's Distributing and acquisition of land in [League City], Texas."

In February 1987 Verkin attempted to negotiate an agreement with some members of the Campbell Estate whereby they would retain an interest in the joint venture. That proposal was never consummated. Instead, on February 24, 1987, Verkin entered a joint venture agreement with George Beach III ("Beach"), his second cousin and employee. The agreement required Beach "upon the request of Verkin [to] cause legal title to the Venture Property to be conveyed to the Joint Venture." The agreement gave Verkin an option to purchase Beach's interest in the venture and in the League City property for $2.2 million. Hendricks, Frye, Verkin and Russo entered into a second joint venture agreement, which noted that Beach had conveyed his interest in the real estate to them.

At closing, Beach received $2.2 million, which he endorsed back to the defendants' joint venture, in return for a $5000 payment. Hendricks, Frye, Verkin and Russo then applied the loan proceeds to the purchase price of the beer distributorship, the real estate, the various expenses connected with the transactions and a payment of $226,826 to each of the four defendants. The $22,826 payments are the focus of this prosecution.

ADMISSIBILITY OF CO-DEFENDANT'S WRITTEN PROFFER

The district court admitted a written proffer of evidence attached to Russo's plea agreement. We review challenged evidentiary rulings for abuse of discretion. *United States v. Buchanan*, 70 F.3d 818, 832 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1340 (1996).

During redirect examination of Russo, the government offered its plea agreement with Russo into evidence, contending it was admissible as a prior consistent statement. The defendants did not object to the admission of the plea agreement, but did object to the proffer, on the grounds that it was hearsay and inadmissible as a prior consistent statement because there had been no allegation of recent fabrication. The government responded that under 801(d)(1)(B) it was proper to introduce prior statements that Russo had adopted to rebut the implied charge of improper influence or motive. The district court allowed the document into evidence and permitted Russo to read portions of it to the jury.

Rule 801(d)(1)(B) provides:

> A statement is not hearsay if-
>
> (1) Prior statement by witness -- The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is. . .
> (B) consistent with the defendant's testimony and is offered to rebut an express

> or implied charge against the declarant or recent fabrication or improper motive.

FED. R. EVID. 801(d)(1)(B). In *Tome v. United States*, 513 U.S. 150, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995)[2], the Supreme Court held:

> [Rule 801(d)(1)(B)] permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper motive only when those statements were made before the recent fabrication or improper influence or motive.

513 U.S. at 155, 115 S.Ct. at 705. Because the proffer was written after the improper influence or motive arose, it was clearly not admissible under Rule 801(d)(1)(B) as interpreted by Tome. Admitting the proffer was thus error. *United States v. Riddle*, 103 F.3d 423, 432 (5th Cir. 1997).

The government concedes that the admission of the proffer violates the holding of Tome, but argues that the error was harmless.

ADMISSIBILITY OF DEFENDANTS' DEPOSITION TESTIMONY

The district court admitted portions of deposition testimony given by Frye and Verkin in a related bankruptcy proceeding as well as Frye's answers to interrogatories pursuant to Rule 801(d)(2)(E), as statements of co-conspirators. The

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[2] *Tome* was decided on January 10, 1995. This case was tried in August 1995.

defendants objected, citing *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) and arguing that the statements were not made in furtherance of the conspiracy. The district court found that the statements were made in the furtherance of the conspiracy, overruled the objections and denied defendants' requests for severance and limiting instructions.

We review the admission of co-conspirator statements under Rule 801(d)(2)(E) for abuse of discretion. *United States v. Krout*, 66 F.3d 1420 (5th Cir. 1995), cert. denied, 116 S. Ct. 963 (1996). The district court's findings of fact relating to the admission are reviewed for clear error. *United States v. Stephens*, 964 F.2d 424, 434 (5th Cir. 1992).

A statement by a co-conspirator is not admissible if the person making the statement does not testify at trial. *United States v. Restrepo*, 994 F.2d 173, 186 (5th Cir. 1993). The government must prove, and the trial court must find, by a preponderance of the evidence that the statements were made in the furtherance of the conspiracy to be admissible under Rule 801(d)(2)(E). *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987). A statement made after the conclusion of the conspiracy is not admissible under Rule 801(d)(2)(E). See *United States v. Esacove*, 943 F.2d 3, 4 (5th Cir. 1991).

The government took the position at trial that the answers to interrogatories and deposition testimony were designed to conceal the conspiracy and to prevent its discovery. In *Grunewald v.*

United States, 353 U.S. 391, 401-02, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957) the Supreme Court distinguished acts of concealment done in furtherance of the main criminal objectives of the conspiracy from acts of concealment done after these central objectives have been attained for the sole purpose of covering up after the crime. 353 U.S. at 405. In this case, the main objective of he alleged conspiracy -- obtaining the excess loan proceeds -- was attained in March 1987, when the loan was funded. The statements in question were made by the defendants years after the receipt of the proceeds.

The prosecution included in the indictment as an additional objective of the conspiracy "to prevent the detection of their receipt of the money." The government argued in the district court that because of this allegation, the co-conspirator statements qualified as "made in furtherance of the conspiracy." The government's brief on appeal does not mention this theory of admissibility. Instead, they argue that the depositions and interrogatories were properly admissible under Rule 801(d)(2)(D) as "a statement of the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, citing *United States v. Saks*, 964 F.2d 1514, 1523-26 (5th Cir. 1992).

We reject the district court's implicit finding that the statements were made "in furtherance" of the conspiracy as contrary to the Supreme Court's mandate in *Grunewalde*. Further, the record does

not reflect the factual predicate necessary for 801(d)(2)(D) admissibility. We therefore find that the district court erred in admitting the defendants' deposition testimony and answers to interrogatories.

HARMLESSNESS

We must next determine whether these errors, either standing alone or cumulatively, were so harmful that they mandate reversal. The Russo proffer, authored by the prosecutor, is particularly troublesome for two reasons. First, it was the government's version of the case, capsulized in written form, available to the jury during deliberations. Second, the proffer was much more favorable to the government's theory of the case than the actual testimony by Russo at trial because it contained statements about the defendants' state of mind, GECU "knowledge" and what GECU would have done had it known the true facts, none of which was included in Russo's trial testimony.

The defendants' statements, made years after the alleged crime, as part of a bankruptcy proceeding are likewise harmful, imputing to the transactions in question.

The cumulative effect of these two errors, in light of the fact that the remaining evidence in this case raised real sufficiency concerns, requires reversal for new trial. See *United States v. Riddle*, 103 F.3d 423, 434 (5th Cir. 1997).

SUFFICIENCY OF THE EVIDENCE

Hendricks, Frye and Verkin each challenge the sufficiency of the evidence to sustain their convictions. Viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, this court must determine whether a rational jury could have found the essential elements of the offenses beyond a reasonable doubt. *United States v. Aubin*, 87 F.3d 141, 144 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 965 (1997).

To establish a conspiracy under 18 U.S.C. § 371, the government must prove (1) there was an agreement between two or more persons to pursue an unlawful objective; (2) the defendant voluntarily agreed to join the conspiracy; and (3) that one of the persons committed an overt act in furtherance of he conspiracy. *United States v. Pettigrew*, 77 F.3d 1500, 1519 (5th Cir. 1996). The agreement to join the conspiracy need not be express, but may be inferred from circumstantial evidence. *Id.* To sustain a bank fraud conviction under 18 U.S.C. § 1344, the government must prove that the defendant knowingly executed or attempted to execute a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any property owned by, or under the custody or control of, a financial institution by means of false or fraudulent pretenses, representations or promises. A "scheme or defraud" includes the use of fraudulent pretenses or representations intended to deceive to obtain something of value from a financial institution. The defendant must take a material

misrepresentation to the bank, that is, one having "the natural tendency to influence or was capable of influencing the decision of the lending institution." *United States v. Campbell*, 64 F.3d 967, 975 (5th 1995).[3] It is clear and undisputed that neither borrowing excess money nor using a trustee (or "strawman," as the government referred to Beach) are crimes. Rather, the government contends that the convictions are based on affirmative concealment intended to defraud -- that is concealment of the fact that the defendants received proceeds beyond what was necessary to purchase the assets.

The defendants contend that this is a legitimate but complex business deal that GECU entered into because it benefitted financially; the

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[3] The Supreme Court recently held that materiality of the falsehood is not an element of the crime of making a false statement to a federally insured bank under 18 U.S.C. § 1014, after concluding that the term "false statement" contained in that statute incorporated no common law meaning requiring materiality. *United States v. Wells*, ____ U.S.____, 117 S.Ct. 921, 927-29, 137 L. Ed. 2d 107 (1997). The statute at issue here proscribes "fraud." The term "fraud" has traditionally encompassed the requirement of a material misrepresentation or omission in order to be actionable. See *BMW of North America v. Gore*, ____ U.S.____, 116 S.Ct. 1589, 1600-1601, 134 L. Ed. 2d 809 (1996). We therefore conclude that *Wells* does not abrogate the Fifth Circuit rule, articulated in *Campbell*, requiring the government to prove materiality in a bank fraud case. See *United States v. Cochran*, 1997 WL 13790, *7 n.3 (10th Cir., March 25, 1997).

transaction bailed GECU out of a disastrous preexisting loan on the beer distributorship. They contend that GECU got exactly what it bargained for in terms of both collateral and risk, and that distribution of the loan proceeds, as well as Beach's role, were revealed in the closing papers. Further, Verkin contends that he was entitled to, but did not receive, a real estate commission on the deal that was greater than the amount he received as his share of the proceeds, making it unlikely that he intentionally committed fraud to get less than he had earned on commission.

The government relies primarily on the testimony of former GECU employee Carol Cambern that she did not know that the loan included excess proceeds and if she had known, she would not have voted to approve the loan. The government argues that Cambern's testimony was "circumstantial corroborated" by the fact that the credit union required a $300,000 certificate of deposit before making the loan. They reason that requiring such security is inconsistent with including excess loan proceeds in the deal. Defendants answer that neither GECU's loan officer assigned to this account, GECU's president, nor its lawyers who drafted and reviewed the loan documents testified. The jury heard no testimony concerning what these individuals knew at the time the loan was made. Further, they argue that the request for additional security is totally consistent with the additional risk involved in loaning excess proceeds.

There were two events referred to at trial as closings. The first was a meeting on March 26, 1987 at the law offices of Fulbright and Jaworski, who served as GECU's attorneys. After extended negotiations and redraftings, the parties concluded the agreement for the purchase of the brewery. The next day, the buyers and sellers attended a real estate closing at Texas American Title Company where the title to the real estate was transferred. No GECU employee, attorney or representative attended the second closing, although they were clearly entitled to be present. Nothing in the record explains their absence. Form the first loan commitment, GECU reserved the right to have their lawyers draft or review every document necessary to close the deal. The details of the transaction changed many times between the initial proposal and final closing, which is typical for a complex, multi-party, multi-million dollar business deal. It is clear that the documents available at the real estate closing revealed all the relevant information, including who held title to the land, how the loan proceeds were being distributed, and Beach's true role in the transaction.

The government introduced into evidence an early proposal from the defendants to GECU that includes a $2.2 million dollar item designated as the amount necessary to buy out prior partners. They asked the jury to infer that "prior partners" refers to Beach, who at that time was not a partner, and who, even when he became a partner in the joint venture, did not hold a $2,2 million dollar interest. However, at the time the document was drafted, the defendants were in negotiations with persons

associated with Campbell Estate whom they asked to join their joint venture. The agreement with Beach was not reached until later. In sum, the "prior partner" item was not a misrepresentation when drafted, and the myriad changes between that early proposal and the final deal, which eventually included Beach as a joint venturer, were revealed in the subsequent paperwork and the closing documents. GECU's failure to review the documents or send a representative to the closing does not make an otherwise legitimate, but complex, business transaction a crime. However, the government asked the jury to infer that the defendants structured the deal in this way in an effort to conceal Beach's true role in the transaction.

The record does reveal that defendants made one misrepresentation during the negotiations, which the government emphasized at trial. The original proposal included approximately 500 acres of real estate, appraised at $32 million. Later, 41 acres were carved out of that parcel and transferred to the defendants free and clear. There is evidence that the defendants lied to GECU about the reason for this change -- claiming that the 41 acre change resulted from "survey problems" which did not exist. A rational juror could certainly conclude that this was a misrepresentation, but it was simply not material to GECU's decision to loan the money. The appraised value of the remaining property was accurately revealed and well in excess of he amount GECU determined was necessary to secure that portion of the loan.

These facts present a very close question. However, we are unable to say that no reasonable juror could have found all of the elements of the charged crimes beyond a reasonable doubt. In the event that the government elects to retry the defendants, the jury, after considering the admissible evidence without the taint of error, must make that determination.

CONCLUSION

For the foregoing reasons, we reserve the defendants' convictions and remand for further proceedings.

REVERSED AND REMANDED.

Appendix D

Constitutional and Statutory Provisions

U. S. Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .

U. S. Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire . . . to commit any offense against the United States . . ., and one or more of such persons do any act to effect the object of the conspiracy, each shall be [fined, or imprisoned, or both].

18 U.S.C. § 1344. Bank fraud

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice —

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be [fined, or imprisoned, or both].

Appendix E

(June 22, 1994)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
VS.	§	CRIMINAL NO.
	§	H-94-141
	§	
MICHAEL J. FRYE,	§	Indictment
JERALD J. HENDRICKS,	§	
JOSEPH E. RUSSO, and	§	Conspiracy; 18
WILLIAM P. VERKIN	§	U.S.C. § 371.
	§	Bank Fraud; 18
	§	U.S.C. § 1344.
	§	
Defendants	§	

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

(Conspiracy, 18 U.S.C. § 371)

A. Introduction.

At all times material to this indictment:

The Government Agencies

1. The National Credit Union Share Insurance Fraud (NCUSIF) was a special fund in

the Treasury of the United States established to protect depositors by insuring accounts in member credit unions.

2. The National Credit Union Administration (NCUA) was a United States agency established to regulate credit unions with accounts insured by NCUSIF. It examined credit unions to assure they operated in a safe and sound manner and conformed to applicable laws and regulations.

The Financial Institution

3. Government Employees Credit Union (GECU), later known as San Antonio Credit Union, was a credit union with accounts insured by NCUSIF.

The Defendants

4. Defendant MICHAEL J. FRYE (FRYE) was a Houston businessman with banking and real estate experience. He owned a company called JMG Financial Corporation.

5. Defendant JERALD J. HENDRICKS (HENDRICKS) was a Dallas land developer who moved to Houston to do deals.

6. Defendant JOSEPH E. RUSSO (RUSSO) was a Houston real estate developer. Prior to his bankruptcy, he owned, operated and controlled three financial institutions (Ameriway Savings Association, Ameriway Bank/Woodway, and Ameriway Bank/Brookhollow) as well as several corporations, including The Russo Companies and its subsidiaries.

7. Defendant WILLIAM P. VERKIN (VERKIN) was a real estate broker from League City.

8. FRYE, HENDRICKS, RUSSO and VERKIN are hereinafter referred to as THE DEFENDANTS.

The Loans

9. THE LOANS describe two loans totalling about $9.6 million that were made by GECU to Burkett's Distributing Company.

The Borrower

10. Burkett's Distributing Company (BURKETT'S) was a wholesale beer distributor owned by THE DEFENDANTS. BURKETT'S held licenses to sell Coors and other brands of beer in the San Antonio area.

The Collateral

11. THE COLLATERAL describes about 500 acres of real estate located in Galveston County which THE DEFENDANTS used as collateral to secure THE LOANS made by GECU to BURKETT'S. The original owners of this property (Campbell Investment Company, EZ Way Corporation, and Ronald Richards as trustee (THE SELLERS)) sold it to THE DEFENDANTS for about $1.5 million down and about $7.4 million in promissory notes.

The Title Company

12. Texas American Title Company (TATCO) was a title company partly owned by

VERKIN. THE DEFENDANTS used TATCO to skim about $666,000.00 of proceeds from THE LOANS made by GECU to BURKETT'S.

The Sham Joint Venture

13. Grand Parkway South Associates Joint Venture was organized to dupe GECU into believing that THE DEFENDANTS needed to pay $2.2 million to a "previous partner" to buy out an interest he supposedly held in THE COLLATERAL. This joint venture caused GECU to loan at least $666,000.00 more to BURKETT'S than it otherwise would have loaned. The joint venture had, at various stages, different venturers.

> The initial joint venture (GPSA I) was proposed between VERKIN and THE SELLERS, but was never finalized.
>
> Later, the joint venture (GPSA II) was between VERKIN and George Beach III.
>
> Finally, the joint venture (GPSA III) was among THE DEFENDANTS.

The Straw Man

14. George Beach III (Beach) was an employee of VERKIN who paid $5,000.00 to act as a straw man for THE DEFENDANTS. To get paid, Beach: (1) signed his name to a sham joint venture agreement (GPSA II) which made it appear that he had an interest in THE COLLATERAL; (2) received a $2.2 million check from TATCO (paid out of proceeds from THE LOANS) to buy out his phantom interest; and (3) immediately endorsed the check and gave it back to TATCO with instructions

to allow THE DEFENDANTS to use it as they wished.

B. The Conspiracy.

15. Beginning around November, 1986, and continuing through sometime around December, 1990, in the Houston Division of the Southern District of Texas, and elsewhere, THE DEFENDANTS,

MICHAEL J. FRYE,
JERALD J. HENDRICKS,
JOSEPH E. RUSSO, and
WILLIAM P. VERKIN,

did knowingly and willfully combine, conspire, confederate and agree with each other, and with others unknown to the Grand Jury, to commit the following offense against the United States:

> To knowingly execute a scheme and artifice to defraud GECU, a federally insured financial institution, and to obtain moneys, funds, assets and other property owned by and under the custody and control of GECU by means of false and fraudulent pretenses, representations and promises, in violation of Title 18, United States Code, Section [1344], (bank fraud).

C. The Object of the Conspiracy.

16. The object of the conspiracy was for THE DEFENDANTS to unjustly enrich themselves with other people's money by skimming about $666,000.00 of federally insured proceeds from THE LOANS made by GECU to BURKETT'S,

and to prevent detection of their receipt of the money.

D. The Method and Means of the Conspiracy.

17. THE DEFENDANTS carried out the conspiracy by making it appear that $2.2 million of proceeds from THE LOANS made by GECU to BURKETT'S would be and was paid to Beach (to buy out an interest he supposedly held in THE COLLATERAL) when in reality Beach secretly kicked back the entire $2.2 million to THE DEFENDANTS -- who then paid only about $1.5 million down to buy THE COLLATERAL directly from THE SELLERS, and pocketed the remaining money (about $666,000.00) to use as they wished.

E. The Overt Acts.

18. To further the conspiracy, these and other overt acts were done in the Southern District of Texas and elsewhere:

(1) On or about November 11, 1996, VERKIN (as trustee for unnamed parties) signed four earnest money contracts giving him the right to buy THE COLLATERAL form THE SELLERS for about $1.5 million down and about $7.4 million in promissory notes.

(2) On or about November 11, 1986, VERKIN gave TATCO four checks totalling $28,000.00 to create the appearance that he paid earnest money on THE COLLATERAL when in reality TATCO never presented the checks to a

bank for payment.

(3) Sometime around December, 1986, HENDRICKS (as trustee for THE DEFENDANTS) bought all the common stock of BURKETT'S from its previous owner.

(4) Sometime around January, 1987, THE DEFENDANTS asked GECU to refinance about $6.6 million of debt that BURKETT'S owed to GECU, as well as to loan BURKETT'S additional money. They proposed to secure repayment of these multi-million dollar borrowings by granting GECU a second lien on THE COLLATERAL.

(5) Sometime around January, 1987, THE DEFENDANTS proposed to GECU that about $2.2 million of proceeds from THE LOANS would be used to pay off unnamed "previous partners".

(6) On or about January 19, 1987, RUSSO caused misleading information which inflated his true financial condition to be sent to GECU in support of the borrowing request.

(7) One or about January 26, 1987, THE DEFENDANTS reduced the size of THE COLLATERAL by about 40 acres, and FRYE caused GECU to be misled about it.

(8) Sometime around February, 1987,

VERKIN began searching for someone willing to act as a straw man in a sham joint venture so THE DEFENDANTS could skim funds from THE LOANS.

The Sham Joint Venture

GPSA I

(9) Sometime around February, 1987, VERKIN tried to negotiate a joint venture agreement (GPSA I) with THE SELLERS. In it, VERKIN agreed to buy THE COLLATERAL from THE SELLERS for $2.2 million down, even though VERKIN (as trustee) had already signed earnest money contracts allowing him to buy it from them for only $1.5 million down. He also proposed a side deal with THE SELLERS where they would repay to him part of the $2.2 million. This joint venture agreement and side deal were never signed.

GPSA II

(10) Sometime around February, 1987, VERKIN signed a sham joint venture agreement (GPSA II) with Beach. In it, VERKIN agreed to pay Beach $2.2 million if Beach would convey to him legal title to THE COLLATERAL -- even though VERKIN (as trustee) already had signed earnest money contracts allowing him to buy it directly from THE SELLERS for only $1.5 million down.

(11) On or about February 24, 1987, THE

DEFENDANTS caused a copy of the GPSA II agreement to be sent to GECU, making it appear that THE DEFENDANTS needed to pay Beach $2.2 million to buy his interest in THE COLLATERAL.

(12) On or about March 25, 1987, VERKIN caused Beach to sign a secret letter that instructed TATCO to allow THE DEFENDANTS to use the entire $2.2 million as they wished. This letter was never disclosed to GECU.

GPSA III

(13) On or about March 25, 1987, VERKIN caused Beach to assign his interest in GPSA II to THE DEFENDANTS, creating a new joint venture (GPSA III).

(14) On or about March 26, 1987, THE DEFENDANTS signed a legal document which represented that Beach had caused legal title to THE COLLATERAL to be conveyed to GPSA III, making it falsely appear that they needed to pay Beach $2.2 million.

The Loans

(15) On or about March 27, 1987, THE DEFENDANTS caused GECU to wire to TATCO about $2.4 million of proceeds from THE LOANS. Of this money, $2.2 million was to be paid to Beach.

(16) On or about March 27, 1987, THE DEFENDANTS caused TATCO to make a

downpayment of about $1.5 million to THE SELLERS, who then conveyed title to THE COLLATERAL directly to GPSA III.

The Kickback

(17) On or about March 29, 1987, THE DEFENDANTS caused TATCO to give Beach a check for $2.2 million. Beach immediately endorsed the check and gave it back to TATCO. In return, TATCO gave Beach a check for $5,000.00, which he kept.

(18) On or about March 29, 1987, THE DEFENDANTS caused TATCO to prepare four checks for about $226,000.00 each payable to FRYE, HENDRICKS, RUSSO (as trustee), and VERKIN.

(19) From on or about March 30, 1987, to on or about April 2, 1987, THE DEFENDANTS caused the four $226,000.00 checks to be endorsed and deposited into accounts controlled by themselves or their employees.

The Bankruptcy

(20) On or about August 22, 1989, FRYE caused BURKETT'S to file bankruptcy, resulting in a multi-million dollar loss to NCUSIF.

(21) On or about December 14, 1990, VERKIN lied under oath at a bankruptcy proceeding by misstating Beach's role in GPSA II and by denying he knew where any

of the proceeds of THE LOANS went, when VERKIN well knew that THE DEFENDANTS received over $1 million of proceeds from THE LOANS.

In violation of Title 18, United States Code, Section 371.

COUNT TWO

(Bank Fraud, 18 U.S.C. § 1344)

A. Introduction.

1. The allegations of the Introduction to Count One are repeated and realleged as if fully set forth herein.

B. The Scheme and Artifice.

2. Beginning around November, 1986, and continuing through sometime around December, 1990, in the Houston Division of the Southern District of Texas, and elsewhere, THE DEFENDANTS,

MICHAEL J. FRYE,
JERALD J. HENDRICKS,
JOSEPH E. RUSSO, and
WILLIAM P. VERKIN,

each aiding and abetting one another, and with others unknown to the Grand Jury, did knowingly devise and intend to devise a scheme and artifice to defraud GECU, a federally insured financial institution, and to obtain monies, funds, assets and other property owned by and under the custody and control of GECU, by means of false and fraudulent pretenses, representations and promises.

C. The Manner and Means of the Scheme.

3. The manner and means of the scheme and artifice to defraud are set forth in Sections D and E of Count One, the allegations of which are repeated and realleged as if fully set forth herein.

D. The Execution of the Scheme.

4. On or about March 27, 1987, THE DEFENDANTS,

MICHAEL J. FRYE,
JERALD J. HENDRICKS,
JOSEPH E. RUSSO, and
WILLIAM P. VERKIN,

for the purpose of executing and attempting to execute the aforementioned scheme and artifice, did knowingly cause to GECU to wire about $2.4 million to TATCO.

In violation of Title 18, United States Code, Section 1344.

A TRUE BILL:

_____
FOREPERSON OF THE
GRAND JURY

GAYNELLE GRIFFIN JONES
UNITED STATES ATTORNEY

Supreme Court, U.S.
FILED
MAR 24 2000

(2)

No. 99-1052

In the Supreme Court of the United States

WILLIAM P. VERKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether there was a constructive amendment of the indictment at trial, where petitioner was indicted on one count of bank fraud and one count of conspiracy to commit bank fraud, and at trial the government produced evidence proving that, in order to accomplish the fraud, petitioner misrepresented the appraised value of a parcel of land.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 193 F.3d 517 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1999. The petition for rehearing was denied on September 21, 1999 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on December 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of bank fraud, in violation of 18 U.S.C. 1344, and one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. 371. Pet. 1-2, 8-9. He was sentenced to 33 months' imprisonment and assessed a $5000 fine. *Id.* at 8-9. The court of appeals affirmed. Pet. App. A1-A4.

1. As described in the indictment, petitioner, a real estate broker, and his business partners engaged in two related business ventures. Pet. App. E4-E5. One involved the purchase of 500 acres of real estate; the other involved the acquisition of a beer distributorship (Burkett's) that had defaulted on loans it owed to the Government Employee Credit Union (GECU). *Id.* at E3-E4. Before the opportunity to purchase Burkett's arose, petitioner entered into four earnest money contracts giving him the right to buy the 500 acres of real estate for a down payment of $1.5 million and $7.4 million in promissory notes. *Id.* at E6. Along with his partners, petitioner purchased the common stock of Burkett's from its previous owners. *Id.* at E7. Petitioner and his partners then decided to structure a deal whereby they would obtain additional loans from GECU for the down payment on the property and for refinancing Burkett's debt of $6.6 million, and would pledge the land as collateral for the loan. *Id.* at E7. To that end, they represented to GECU that $2.2 million of the loan proceeds were needed to pay off unnamed previous partners. *Id.* at E4, E6-E7.

Petitioner approached his employee George Beach to act as the purported previous partner. Pet. App. E4-E5, E8-E9. Beach signed a "sham" joint venture agree-

ment with petitioner in which petitioner agreed to pay Beach $2.2 million if Beach would convey to him the legal title in the real estate. *Id.* at E8. That agreement furthered the fraud because Beach had no legal interest in the property and petitioner already had signed contracts to purchase the property from the sellers for only $1.5 million down. Petitioner and his partners then forwarded this sham joint venture agreement to GECU, to induce the credit union to believe that petitioner and his partners needed the $2.2 million to buy out Beach's interest in the property. *Id.* at E9.

Following receipt of a legal document ostensibly showing that Beach had conveyed legal title to the property to the partners, GECU wired the title company, which petitioner partly owned, about $2.4 million of proceeds from the loans, of which $2.2 million was to be paid to Beach. Pet. App. E9. Petitioner and his partners then caused the title company to pay the sellers of the property $1.5 million, the down payment specified in the original earnest money contract that petitioner had entered into with the sellers. *Id.* at E9-E10. The title company also gave Beach a check for $2.2 million, which he endorsed back to the title company. *Id.* at E10. The title company then gave Beach a check for $5000, his fee for participating in the scam, and each of the four partners checks for $226,000. *Ibid.*

Two years later, Burkett's filed for bankruptcy, causing a multi-million dollar loss to the National Credit Union Share Insurance Fund. Pet. App. E10.

As described in the indictment, the object of the conspiracy was to enable the defendants to "unjustly enrich themselves with other people's money by skimming about $666,000.00 of federally insured proceeds" from the GECU loans to Burkett's, and to "prevent detection of their receipt of the money." Pet. App. E5-

E6. The indictment explained that the "method and means of the conspiracy" were that the defendants made it appear that they needed $2.2 million from the GECU loan to buy out Beach's interest in the property, when in fact, that money was "kicked back" to petitioner and his partners from which they skimmed about $666,000. *Id.* at E6. The facts described above were outlined in a section of the indictment alleging "these and other overt acts." *Id.* at E6. The bank fraud scheme charged in count two referred back to the facts outlined in the conspiracy count. *Id.* at E11-E12.

2. In 1995, petitioner and two of his co-conspirators proceeded to trial, and the jury found them guilty on both counts. Pet. 3-4.

3. In an unpublished opinion, the court of appeals reversed the convictions on evidentiary grounds and remanded for a new trial. Pet. App. C9. It rejected the defendants' contention that the evidence was insufficient to sustain their convictions. *Id.* at C15. It described the focus of the prosecution as the payment of the $226,826 to each of the defendants. *Id.* at C4.

4. In 1998, petitioner proceeded to trial for the second time.[1] Pet. 6-9. At trial, the government established, among other things, that petitioner obtained GECU funds by misrepresenting to the credit union that he needed to buy out a previous partner. Gov't C.A. Br. 6, 8-11. In addition, the government introduced evidence concerning the appraisals of the real estate that GECU had requested. Petitioner was responsible for securing the appraisals because he knew the appraisal company. The appraisals that petitioner submitted to GECU substantially overstated the value

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[1] Petitioner's coconspirators pleaded guilty before the second trial. Pet. 6.

of the land, as measured by comparable selling prices of nearby property.[2] *Id.* at 7. Following a jury verdict, petitioner again was convicted on both counts. Pet. 8.

5. The court of appeals affirmed. Pet. App. A1-A4. In response to petitioner's contention that the government's evidence of the falsified appraisals unconstitutionally broadened the charges in the indictment, the court, in an unpublished opinion, held that "evidence of an additional false statement does not change the offense with which [petitioner] is charged." *Id.* at A3.

ARGUMENT

1. Petitioner contends (Pet. 10-17), as he did below, that the jury found him guilty of fraud and conspiracy for conduct that was not charged in the indictment, violating his Fifth Amendment right to grand jury indictment and his Sixth Amendment right to a fair trial. The legal principles governing petitioner's claim are well settled. Because petitioner's contentions are highly fact-bound and without merit, this Court's review is not warranted.

As this Court has explained, "[i]t is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him." *Schmuck* v. *United States*, 489 U.S. 705, 717 (1989). The constitutional right to indictment by grand jury provides a body independent of the prosecutor and the

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[2] In its decision following the first trial, the court of appeals stated that the appraised value of the property was accurate and in excess of the amount necessary to secure the loan. Pet. App. C14. The government had not introduced evidence to the contrary at that trial, Gov't C.A. Br. 24, but had argued to the court in the presence of the defendant that the appraisal was "a pie in the sky" and "unrealistic," Pet. 3.

judge that determines whether the prosecution will proceed. See *Russell* v. *United States*, 369 U.S. 749, 760-761 (1962). The indictment also guarantees that the accused will have notice of the crimes charged and can plead former jeopardy in any future case. See *id.* at 764.

An indictment "may charge numerous offenses or the commission of any one offense in several ways." *United States* v. *Miller*, 471 U.S. 130, 136 (1985). "As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges * * * other means of committing the same crime." *Ibid.* Nor is it necessary for the government to charge "every single act of execution of the scheme" that it intends to introduce at trial to avoid a constructive amendment of the indictment. *United States* v. *Pless*, 79 F.3d 1217, 1220 (D.C. Cir.), cert. denied, 519 U.S. 900 (1996).

This Court has held that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone* v. *United States*, 361 U.S. 212, 215-216 (1960) (citing *Ex parte Bain*, 121 U.S. 1 (1887)). A constructive amendment of the indictment occurs "when the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States* v. *Mollica*, 849 F.2d 723, 729 (2d Cir. 1988) (internal quotation marks omitted). The danger is that where the "variation between pleading and proof" is so great that the indictment "cannot fairly be read as charging" the

conduct for which the accused is convicted, no court could know that the grand jury would have been willing to charge that conduct. *Stirone*, 361 U.S. at 217. The critical question in determining whether a constructive amendment has occurred is whether the jury considered a crime not charged by the grand jury, not whether the jury considered facts other than those alleged in the indictment that pertain to the charged offense. See *Miller*, 471 U.S. at 136.

The court of appeals correctly held that the evidence of the inflated appraisals did not change the offenses for which petitioner was charged. The charges here, bank fraud and conspiracy to commit bank fraud, were based on the scheme, as described in the indictment, "to unjustly enrich [petitioner and his coconspirators] with other people's money by skimming about $666,000.00 of federally insured proceeds" from the GECU loans and "to prevent detection of their receipt of the money." Pet. App. E5-E6. The evidence of the inflated appraisals did not unconstitutionally alter the indictment; instead that evidence demonstrated the existence of the same scheme to obtain fraudulently GECU funds that the credit union would not have loaned to petitioner and his co-conspirators absent the misrepresentations.

In addition, the district court's jury charge did not alter the indicted offenses in any fashion. It clearly instructed the jury that it could find petitioner guilty only if "the Government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the Indictment." Jury Charge 13. It also stated, as to the conspiracy charge, that the jury must find that "two or more persons made an agreement to commit the crime of knowingly executing a scheme and artifice to defraud the Government

Employees Credit Union *as charged in the indictment*." *Id.* at 7 (emphasis added). As to the bank fraud count, it similarly emphasized that "[w]hat must be proven beyond a reasonable doubt is that the accused knowingly executed or attempted to execute a scheme *that was substantially similar to the scheme alleged in the indictment*." *Id.* at 11 (emphasis added). The court made no mention of the appraisals in its charge. In light of the jury instructions, the jury could not have convicted petitioner of any crime other than that alleged in the indictment. See *United States* v. *St. Gelais*, 952 F.2d 90, 95 (5th Cir.) (charge that instructs jury that government must prove scheme alleged in indictment "guarantee[s] [that] the jury did not return a guilty verdict on a theory which broadened the scheme outlined in the indictment"), cert. denied, 506 U.S. 965 (1992).

2. The cases on which petitioner relies to assign error to the court of appeals are unavailing. In *Stirone* v. *United States*, 361 U.S. 212 (1960), this Court found an unconstitutional amendment of the indictment because the proof at trial and the jury charge broadened the bases for conviction from those charged in the indictment. In that case, brought under the Hobbs Act, the indictment charged that Stirone had engaged in extortion that obstructed the victim's receipt of shipments of sand from outside Pennsylvania into that State to be used for production of concrete at the victim's plant. See *id.* at 213-214. At trial, by contrast, the government introduced evidence that the extortion obstructed commerce because concrete made by the victim would be used in a steel mill which would export steel to other States, a separate basis for demonstrating an effect on interstate commerce. See *id.* at 214. In the jury charge, the district court instructed

that the jury could find Stirone guilty based on the alternate theory of interference with commerce. *Ibid.* This Court concluded that the indictment had been unconstitutionally broadened and Stirone was thereby "convicted on a charge the grand jury never made against him." *Id.* at 219.

The other cases that petitioner cites similarly involve instances in which the district court charged the jury in a manner that allowed it to convict on a basis not charged in the indictment. In *United States* v. *Nunez*, 180 F.3d 227 (5th Cir. 1999), the indictment charged the defendant with assault, in violation of 18 U.S.C. 111, by means of a fully loaded .40 caliber Beretta semi-automatic; but the court instructed the jury that it could convict even without the defendant's use of a weapon. In *United States* v. *Doucet*, 994 F.2d 169 (5th Cir. 1993), the indictment charged the defendant with possessing an unregistered firearm modified to fire as a machinegun; but the government argued and the court charged that the defendant could be convicted for possessing the unassembled parts of a machinegun.[3] Here, by contrast, neither the court's jury instructions nor the government's proof at trial altered the crime charged in the indictment. At bottom, the bank fraud scheme involved petitioner's misrepresenting to the credit

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[3] The cases that petitioner cites in footnote six of his petition, Pet. 17 n.6, also do not further his argument. In all but two of the cases, the court impermissibly altered the basis on which the jury could convict through its charge. In *United States* v. *Willoughby*, 27 F.3d 263 (7th Cir. 1994), the trial was by the court, and it found defendant guilty of violating 18 U.S.C. 924(c) (1994 & Supp. IV 1998) by relying on a drug predicate that differed from the predicate charged in the indictment. In *Moore* v. *United States*, 512 F.2d 1255 (4th Cir. 1975), the court found neither a constructive amendment of the indictment nor a fatal variance.

union the need for the loan in order to profit personally. This theory was not abandoned at trial. Instead, the evidence of the inflated appraisals furthered the charged scheme by inducing the credit union to believe that its loan was protected by adequate collateral.

3. Because evidence of the inflated appraisals did not constructively amend the indictment, petitioner's argument (Pet. 18-19) that he was denied notice of the charges against him is misplaced. It is well established that an indictment is not required to set out expressly every action of the defendant that may have contributed to the commission of the crime charged.[4] See, *e.g.*, *United States* v. *Hajecate*, 683 F.2d 894, 898 (5th Cir. 1982) ("What the defendants seek * * * is essentially the disclosure by the government of its full theory of the case and all the evidentiary facts to support it. That is not and never has been required."), cert. denied, 461 U.S. 927 (1983); *United States* v. *Williams*, 679 F.2d 504, 508 (5th Cir. 1982) (indictment need not set forth "facts and evidentiary details necessary to establish each of the elements of the charged offense"), cert. denied, 459 U.S. 1111 (1983). Rather, the primary purposes of the indictment are to give the accused notice of the charges against him, to protect the accused against double jeopardy, and to preserve the role of the grand jury as an independent body interposed between the accused and the state. See, *e.g.*, *Schmuck*, 489 U.S. at 717- 718; *Miller*, 471 U.S. at 134-135; *Russell*, 369 U.S. at 763-764. The indictment in this case did so; it sufficiently alleged the crime charged to afford these constitutional protections.

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[4] In any event, by his own admission, petitioner was aware as early as the first trial that the government believed the appraisals were inflated. Pet. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2000

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No. 99-1052

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

WILLIAM P. VERKIN,

Petitioner,

versus

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER WILLIAM P. VERKIN'S REPLY BRIEF

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March 27, 2000

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Reply Brief

The Government's brief in opposition effectively concedes:

1. The indictment (App. E-1) does not allege, either directly or by implication, that Verkin knowingly misrepresented the appraised value of the land to the credit union.

2. In the first trial, the Government introduced no evidence, and made no argument, that Verkin knowingly misrepresented the appraised value of the land to the credit union.

3. On the first appeal, the Fifth Circuit rejected virtually all of the Government's case as it was then presented, holding that "[t]he appraised value of the [land] was accurately revealed and well in excess" of the amount necessary to secure the loan (App. C-1, 14).

4. The Government did not inform Verkin and his counsel that it would rely for conviction on the previously undisclosed accusation concerning the appraised value of the land until the morning the second trial began, almost four years after the return of the indictment.

5. The trial judge overruled Verkin's timely Fifth and Sixth Amendment objections to being tried on the previously undisclosed accusation concerning the appraised value of the land (Supp. R. 2: 138-42; R. 2, Tab 317, April 27, 1998).

6. The trial judge refused Verkin's timely request for a brief continuance, to allow him to attempt to gather evidence to rebut the accusation concerning the appraised value of the land (R. 2: Tabs 325, 327, May 4, 1998).

7. The Government urged the jury to find Verkin guilty on the basis of the accusation concerning the appraised value of the land (Supp. R. 12: 192).

8. The Court of Appeals affirmed Verkin's convictions for conspiracy and bank fraud, solely upon the accusation concerning the appraised value of the land, without deciding whether the evidence was insufficient to support the other accusations that were actually made in the indictment (A-1, 3-4).

In view of these undisputed circumstances, the Government's extended summary of the indictment in its reply is largely irrelevant. In the first appeal, the Fifth Circuit rejected virtually all of the allegations in the indictment concerning the supposed "sham joint venture," "skimming," and "kickbacks," the crux of the conspiracy and bank fraud counts. In the second appeal, the panel did not even consider those issues, instead affirming the convictions solely on an alternative allegation that Verkin "participated in a misrepresentation of the appraised value of the land" (A-1, 4) — an accusation the indictment never made.

The Government's suggestion that the questions in the petition are "highly fact-bound" also misses the mark. Verkin does not ask this Court to evaluate the claimed insufficiency of the evidence, apart from the purported misrepresentation concerning the appraised value of the land. That should be left to the Court of Appeals, following remand.

Rather, the issues presented are whether two serious federal criminal convictions can be sustained, solely on the basis of an accusation that was never made in the indictment, and of which the defendant and his counsel were given no fair notice before the trial began. The legitimacy and importance of those questions are apparent from the face of the record. They are appropriate for review under Supreme Court Rule 10.

Verkin's indictment "cannot fairly be read as charging" the conduct eventually relied upon by the Court of Appeals to sustain his convictions. *Stirone v. United States*, 361 U.S. 212, 217 (1960). Misrepresenting the appraised value of the collateral securing the loan was simply not the criminal conduct constituting the bank fraud and conspiracy offenses alleged in the indictment, just as interstate steel shipments were not alleged as criminal conduct by the indictment in *Stirone*.

Of course, Verkin's indictment need not have alleged, and the Government need not have disclosed prior to trial, all of the "evidentiary facts"

supporting its case. *E.g., United States v. Hajecate*, 683 F.2d 894, 898 (5 Cir. 1982); *United States v. Williams*, 679 F.2d 504, 508 (5 Cir. 1982), *cert. denied*, 459 U.S. 1111 (1983). Here, however, the indictment did not charge as criminal the only conduct relied upon by the Court of Appeals to sustain the convictions, thereby impermissibly allowing an indictment and conviction "to rest on one point and the affirmance of the conviction to rest on another." *Russell v. United States*, 369 U.S. 749, 766 (1962). Like Stirone, Verkin "was convicted on a charge the grand jury never made against him." *Stirone v. United States*, 361 U.S. at 219.

Nor is it at all significant, as the Government seems to think, that the trial court's jury instructions did not alter the indictment, make specific reference to real estate appraisals, or "[a]llow the jury to find a scheme larger than or different from the one charged in the indictment." *United States v. St. Gelais*, 952 F.2d 90, 94 (5 Cir. 1992). The issue here is not what the *jury* did, but what *the Court of Appeals* did. Even if the jury did not convict Verkin of knowingly misrepresenting the appraised value of the land to the credit union, the Court of Appeals *thought* it did, because that was its only basis for affirming the convictions. A criminal conviction cannot be sustained on a finding the jury never made.

Finally, the Government's arguments that Verkin was provided with fair notice of the accusations against him are singularly unpersuasive. The indictment did not charge that Verkin knowingly misrepresented the appraised value of the land, the only ground on which the convictions eventually were sustained. An accused cannot meaningfully be said to have had fair notice of "a charge that was never made." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

Conclusion

Verkin asks that the Court grant certiorari; hold that the affirmance of Verkin's convictions on the grounds adopted by the Court of Appeals violated the Fifth and Sixth Amendments; and remand the case to the Court of Appeals, for a determination of whether the evidence is otherwise constitutionally sufficient to support the allegations in the indictment.

Respectfully submitted,

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